BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

DUELL L. FITZPATRICK Claimant	)	
V.	)	
NORCRAFT COMPANIES, LLC Respondent	)	Docket No. 1,070,848
AND	)	
TRAVELERS INDEMNITY CO. OF AMERICA Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the November 5, 2014, preliminary hearing Order entered by Administrative Law Judge (ALJ) Thomas Klein. Brian D. Pistotnik of Wichita, Kansas, appeared for claimant. Clifford K. Stubbs of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

The ALJ ordered an independent medical evaluation (IME) to determine causation/prevailing factor and treatment recommendations for claimant's low back. The ALJ found claimant failed to give timely notice to respondent of his bilateral tarsal tunnel syndrome.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the October 23, 2014, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant appeals only whether timely notice was given regarding bilateral tarsal tunnel syndrome. Claimant argues notice for his injuries caused by repetitive trauma was

not due until June 13, 2014, thirty days[1] from the date he was first given restrictions by a physician. Further, claimant contends he informed his supervisor of numbness in his feet due to standing in March 2014. Claimant was not aware of the specific bilateral tarsal tunnel diagnosis until June 30, 2014.

Respondent maintains the ALJ's Order should be affirmed in all respects. Respondent argues claimant's testimony, at best, supports a finding he informed his supervisor of problems related to his back claim. Respondent argues claimant never discussed his feet or his foot pain with his supervisor; therefore, compensability of claimant's foot condition should be denied.

The issue for the Board's review is: Did claimant provide timely notice to respondent of his bilateral tarsal tunnel condition?

FINDINGS OF FACT

Claimant settled a prior workers compensation claim with a different employer on July 14, 2010, for an amount representing an approximate 56 percent work disability. Claimant was assigned impairment ratings for bilateral carpal tunnel syndrome, neck and low back conditions. Claimant agreed he underwent physical therapy for his back, neck and hands, but did not feel he had any impairment to the low back following treatment.

Claimant started working for respondent on May 23, 2012, where he shaped and sanded various sizes of cabinet doors with power air tools. In this position, claimant lifted 1,000 doors per day and was required to repeatedly bend and twist during his 10-12 hour shift. Claimant testified he had no foot or back problems prior to working for respondent. Claimant stated he underwent a pre-employment physical and was capable of performing his job on May 23, 2012.

Claimant stated his back began to worsen over time, and he reported his problem to his supervisor, Jay Penner, in October 2013. Claimant testified he informed Mr. Penner of his back pain and that the pain was work-related. Mr. Penner did nothing in response and claimant obtained treatment on his own.

Claimant began treatment with Jay Wedel, PA-C, on November 26, 2013. Mr. Wedel is a physician assistant working for claimant's primary care physician, Dr. Mark Hall. Mr. Wedel recommended an MRI of the lumbar spine on February 28, 2014. On March 21, 2014, Mr. Wedel recommended epidural injections. An MRI obtained on March 7, 2014, revealed degenerative disk disease at L5-S1 with essential herniation at L5-S1, along with a degenerative bulging disk at L4-5. Epidural injections to the lumbar spine

[1] This argument is made on page 4 of claimant's brief. K.S.A. 2013 Supp. 44-520 requires notice within 20 days of repetitive trauma.

were recommended and completed, though records indicate claimant had only temporary relief before the pain returned. Claimant was referred to Dr. Ali Manguoglu, a neurosurgeon.

Dr. Manguoglu first examined claimant on May 12, 2014. Records indicate claimant complained of chronic back pain that had worsened and bilateral leg discomfort, including numbness and weakness. Dr. Manguoglu recommended claimant undergo a nerve conduction study/EMG and MRIs to the cervical and thoracic spine. Dr. Manguoglu placed claimant on light-duty restrictions.

Claimant's last day worked was May 13, 2014. Claimant testified respondent was unable to accommodate his restrictions.

On May 16, 2014, claimant underwent a discogram with abnormal results at L4-5 and L5-S1. Dr. Manguoglu recommended right L4-5 and L5-S1 lumbar microdiscectomies. Claimant also visited Mr. Wedel this day for completion of disability paperwork. Records indicate claimant complained of low back pain and radicular pain down the right leg.

Dr. William Kossow performed a nerve conduction study/EMG on May 29, 2014. Dr. Kossow noted no electrodiagnostic evidence of lumbosacral radiculopathy, but claimant's radicular symptoms could be from nerve root irritation from bulging discs. Dr. Kossow also found claimant had bilateral tarsal tunnel syndrome "that could be contributing to foot numbness but obviously isn't causing the LBP and radicular leg symptoms."[2]

Claimant underwent surgery with podiatrist Dr. Timson, who removed a bone spur from claimant's right foot on June 5, 2014. Claimant testified the treatment he received from Dr. Timson was unrelated to tarsal tunnel symptoms or his work at respondent. Claimant also noted the only treatment he received related to his feet was with Dr. Timson.

Both Dr. Manguoglu and Mr. Wedel wrote letters in July 2014 indicating claimant's low back injury was work-related. In a letter dated July 24, 2014, Mr. Wedel wrote:

> Patient also suffers from tarsal tunnel syndrome. I suspect the patient's long hours on concrete, along with the weight that he was asked to maneuver and manipulate contributed to his tarsal tunnel syndrome bilaterally. Patient has been referred to a neurosurgeon and has had further diagnostic imaging done with reiterates the above diagnoses.[3]

Dr. John Estivo saw claimant on October 7, 2014, at respondent's request. After reviewing claimant's medical records, history, and performing a physical examination, Dr.

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[2] P.H. Trans., Resp. Ex. B at 12.

[3] P.H. Trans., Cl. Ex. 1 at 2.

Estivo concluded claimant sustained preexisting age-related degenerative disc disease to the lumbar spine with chronic lumbar spine pain. Dr. Estivo did not offer an opinion related to claimant's bilateral tarsal tunnel syndrome. Dr. Estivo indicated claimant denied any previous lumbar spine injuries and denied receiving any previous settlement regarding any lumbar spine injuries. Claimant testified he did not inform Dr. Manguoglu or Mr. Wedel of his prior back injuries.

Claimant stated he was unaware of the tarsal tunnel syndrome until testing with Dr. Kossow. He indicated he did not return to inform respondent of the tarsal tunnel syndrome because he was no longer working in June 2014 and felt there "[was not any] reason to go back to talk to them since they had said they didn't have light-duty work for [him] to do."[4]

Claimant testified his foot symptoms began approximately three weeks following his back injury. He stated:

> Q. So then when did your feet start hurting?
>
> A. When they started getting numb, tingling.
>
> Q. When did that start happening?
>
> A. That probably happened – this is probably, oh, I don't know, about three weeks later after that [started] going on.
>
> Q. So after you had talked to your supervisor about your back?
>
> A. Yes.
>
> Q. Did you ever talk to your supervisor about your feet?
>
> A. No.[5]

Claimant later testified on redirect:

> Q. And you said you never told your employer you were having the numbness in your feet?
>
> A. On the feet part, I was standing, I just told him that – well, I told them, explained to them that it was pains and stuff going down there, from my back, down into my legs and stuff, yes, I told them that because at the time I didn't know, you know

[4] P.H. Trans. at 49.

[5] *Id.* at 33-34.

what I'm saying, it was a nerve – nerve problem of that was causing it, that part that was going down to my feet.

Q. So you did tell Jay Penner you were having numbness in your feet?

A. Yes.

Q. When?

A. Well, that would be probably about when I was telling him about my legs and stuff was buckling and my feet was numb and stuff, I told him that. But I didn't know exactly what it was from.

Q. And that was in March?

A. Yes.

Q. Okay.

A. I didn't know exactly what it was from.

Q. But you thought it was due to your back?

A. I thought it was just due to the back.

Q. And that is when you were telling him the lifting at work was hurting your back?

A. Yes. I told him that.[6]

PRINCIPLES OF LAW

K.S.A. 2013 Supp. 44-508 states, in part:

(e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

(1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;

[6] *Id*. at 46.

(2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;

(3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or

(4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

. . .

(f)(2)(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

> (i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;
>
> (ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and
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> (iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

(h)“Burden of proof” means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2013 Supp. 44-520 states, in part:

(a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 20 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

> (C) if the employee no longer works for the employer against whom benefits are being sought, 10 calendar days after the employee's last day of actual work for the employer.
>
> Notice may be given orally or in writing.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[7] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[8]

ANALYSIS

In his Application for Hearing, claimant alleged a series of injuries each and every working day from July 1, 2013, through his last date of work on May 13, 2014. Claimant testified he first told his supervisor, Jay Penner, that he had work-related back pain in October 2013. Claimant's back pain continued to worsen through March 7, 2014, when an MRI was performed as a result of low back pain and radiculopathy.

Respondent does not dispute claimant gave notice of a low back injury. On March 21, 2014, claimant complained of pain radiating into his legs to Mr. Wedel. Mr. Wedel diagnosed radiculitis at that time. In the examination report dated May 12, 2014, Dr. Manguoglu noted weakness and numbness in claimant's legs. Up to the point claimant stopped working, his back and leg complaints were treated as a low back injury. Only after an EMG and nerve conduction studies did Dr. Mangoulu diagnose tarsal tunnel syndrome as opposed to radiculopathy.

Claimant's back complaints to Mr. Wedel and Dr. Manguoglu included pain radiating down the lower extremities. At the time notice was given, the documented medical evidence included symptoms in the lower extremities. Claimant's uncontroverted testimony is that he told his supervisor his back was hurting because of work. He also testified he told Mr. Penner about the pain in his legs and numbness in his feet. Mr. Penner did not testify to controvert this testimony.

Kansas courts have long held the notice statute "contemplates . . . notice of injury, so that the employer may have fair opportunity to investigate the cause and observe the

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[7] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[8] K.S.A. 2013 Supp. 44-555c(j).

consequences."[9] Any investigation into the low back claim would have led to the information relating to tarsal tunnel syndrome. Respondent had a fair opportunity to investigate the claim. The undersigned finds, for the purpose of this hearing, claimant gave notice of a low back condition that included symptoms of tarsal tunnel syndrome.

At the preliminary hearing, respondent's counsel argued claimant's work activities were not the prevailing factor causing his injury or medical condition. The ALJ did not address the issue of prevailing factor for either the low back or tarsal tunnel syndrome in his Order. As the issue was not raised in claimant's appeal, the undersigned does not have jurisdiction to address the issue in this Order.

CONCLUSION

Claimant gave timely notice of a work-related injury, including his low back and lower extremities.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Thomas Klein dated November 5, 2014, is reversed.

IT IS SO ORDERED.

Dated this _____ day of January, 2015.

_____
HONORABLE SETH G. VALERIUS
BOARD MEMBER

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[9] *Battah v. Hi-Lo Indus., Inc.*, No. 110,972 (Kansas Court of Appeals unpublished decision filed December 12, 2012); citing *Davis v. Shelly Oil Co.*, 135 Kan. 249, 251, 10 P.2d 25 (1932).